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PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports for November.

Action, Survival, False Representations

According to a recent decision of the Supreme Court of Vermont, an action to recover for false representations made by the seller of personal property does not survive, as against his estate, under a statute (Rev. Stat. Vt. § 2446,) which provides that actions "of trespass and trespass on the case for damages done to . . . . personal estate shall survive:" *Jones* v. *Ellis's Estate*, 35 Atl. Rep. 488.

Building Associations, Fines

The Supreme Court of Arkansas has lately held, that the monthly fines provided for by the by-laws of a building and loan association are not by way of penalty, but are rather to be considered as liquidated damages, fixed by consent of the parties, for the loss sustained by the association by reason of the failure of the defaulting member to make prompt payment; and since such payments are essential to the success of the plan of the association, and for the interest of its members as a whole, the fines will be enforced, independently of statutory provisions, if reasonable in amount and equitable in their application: *Roberts* v. *American Bdg. & Loan Assn.*, 36 S. W. Rep. 1085.

This case also holds that a fine of "ten cents per share, to be imposed for each and every month that payment is not made," is reasonable.

Accumulative Fines, Construction of By-Law

Under a by-law of a building association, which provides that "borrowing members who shall neglect to pay any instalments as the same become due, shall pay to the association a fine of twenty cents per month on each one hundred dollars that they have borrowed from the association," the fine for one

month is not repeated and added to that of each succeeding month, making the amount increase in arithmetical progression, but only twenty cents on each one hundred dollars can be imposed in any one month; and when the constitution of a building association prescribes the fines to be imposed on delinquent members, it thereby fixes the limit beyond which the association cannot go; but it may by by-law waive some part of the fines so authorized, and impose smaller ones, and in that case the by-law will govern: *Dupuy* v. *Eastern Bdg. & Loan Assn.*, (Supreme Court of Appeals of West Virginia,) 25 S. E. Rep. 537.

Imposition of Fines, Waiver

A genuine silver coin of the United States, which is distinguishable as such, though rare, and differing in appearance from other coins of this government of the same denomination, but of later date, is nevertheless a legal tender for car fare, and a passenger ejected for refusal to pay fare otherwise than by tendering such a coin is entitled to recover damages: *Atlanta Consolidated St. Ry. Co.* v. *Keeny*, (Supreme Court of Georgia,) 25 S. E. Rep. 629.

Carriers, Fare, Legal Tender, Ejection

In *Chicago & A. R. R. Co.* v. *Mulford*, (Supreme Court of Illinois,) 44 N. E. Rep. 861, reversing 59 Ill. App. 479, the defendant company sold to the plaintiffs, ticket brokers, a number of tickets over its own road, with coupons attached for transportation over a connecting line. These tickets were issued under an agreement with that line, and were honored by it for a number of years, until it passed into the hands of a receiver, who was ordered by the federal court to refuse to accept the rest of said tickets for passage. The plaintiffs then sued the defendant for damages, and recovered judgment; but this was reversed by the Supreme Court, on the ground that in selling those coupons the defendant acted merely as the agent of the connecting line, and was not liable for its failure to perform its contract.

Sale of Coupon Tickets over Other Lines, Liability for Default of Connecting Line

The Supreme Court of Indiana has lately ruled, that though

a railroad company cannot, by special contract with a passenger, exempt itself from liability for the results of its negligence as a common carrier, yet, since it is no part of its duty as a common carrier to carry the goods of an express company and the messengers in charge thereof, when it does undertake to carry an express messenger, as a matter of accommodation, or by special engagement, it becomes a private carrier, or bailee for hire, as to him, and may protect itself by contract from the results of its negligence so far as he is concerned; and therefore, if an express messenger contracts with the express company to assume all risk of injury he may sustain in the course of his employment, whether occasioned by the gross or other negligence of any railroad, or other carrier, and authorizes the express company to enter into a contract on his behalf with any such carrier, exempting it from liability for injuries he may receive in the course of transportation, a contract between the express company and a carrier in pursuance of the authority so conferred is valid and binding on him; but the mere fact that he has made such a contract with the express company will not entitle a carrier by which he is transported to the benefit of that contract, if it had no knowledge of it [or if it did not proceed to secure its benefits by contracting with the express company?]: *Louisville, N. A. & C. Ry. Co.* v. *Keefer*, 44 N. E. Rep. 796.

Liability for Injury, Express Messenger, Limitation of Liability by Contract

According to another decision of the Supreme Court of Illinois, when a carrier, through its negligence, fails to send a passenger's baggage by the same train as the passenger, it is liable for the loss of the baggage, if destroyed in consequence of such delay, though by an act of God: *Wald* v. *Pittsburgh, C., C. & St. L. R. R. Co.*, 44 N. E. Rep. 888, reversing 60 Ill. App. 460.

Liability, Act of God

This case declares the Johnstown flood, caused by the breaking of a dam which retained a large volume of water at a high elevation, caused by extraordinary and unprecedented rains, thereby letting into a narrow valley a volume of water twenty to thirty feet in height, to have been an act of God.

Carrying Concealed Weapons

The Supreme Court of Georgia has lately assisted in the demonstration of the proposition that law is the perfection of human reason, by holding that one who carries a pistol from a shop where it had been repaired, though he does so at the request of the owner, and for the sole purpose of delivering it to him, is guilty of the offence of carrying a concealed weapon, if he carries it concealed upon his person: *Goldsmith* v. *State*, 25 S. E. Rep. 624.

Charitable Gift, Limitation Over, Validity

In the opinion of the Supreme Court of Errors of Connecticut, a limitation in a deed by which property is conveyed in trust for a certain church parish, that, if the beneficiary ceases to exist in union with the diocese, the property shall be held in trust for another parish, is valid; and a provision that in such case it shall be held "for such uses as will most nearly accomplish the object desired," is not void for uncertainty: *Parish of Christ Church* v. *Trustees*, 35 Atl. Rep. 552.

Generally speaking, the rule against perpetuities does not extend to charitable gifts; *In re Wall*, 42 Ch. D. 510, 1889; *Grissom* v. *Hill*, 17 Ark. 483, 1856; *New Haven Inst.* v. *New Haven*, 60 Conn. 32, 1891; *Richmond* v. *Davis*, 103 Ind. 449, 1885; *Board* v. *Dinwiddie*, 139 Ind. 128, 1894; *Dexter* v. *Gardner*, 7 Allen, (Mass.) 243, 1863; *In re Bartlett*, 163 Mass. 509, 1895; *Wardens & Vestry of St. Paul's Ch.* v. *Atty. Gen.*, 164 Mass. 188, 1895; *Atwater* v. *Russell*, 49 Minn. 57, 1892; *State* v. *Gerard*, 2 Ired. Eq. (N. C.) 210, 1842; *Yard's Appeal*, 64 Pa. 95, 1870; *Webster* v. *Wiggin*, (R. I.) 31 Atl. Rep. 824, 1895; *Paschal* v. *Acklin*, 27 Tex. 173, 1863; but if it is conditioned upon a future and uncertain event, it is then subject to the rule: *Chamberlayne* v. *Brockett*, 8 L. R. Ch. 206, 1872; *Yates v. Yates*, 9 Barb. (N. Y.) 324, 1850; *e. g.*, a bequest to a volunteer corps of militia, to take effect upon the appointment of the next lieutenant-colonel, is void as a perpetuity, because such an officer may never be appointed: *Alt* v. *Lord Stratheden*, [1894] 3 Ch. 265, 1894.

Accordingly, a gift to an individual, and then to a charity upon contingency, is within the rule, and will never vest, if the contingency is not within the time allowed: *Atty. Gen.* v. *Gill*, 2 P. Wms. 369, 1726; *Leonard* v. *Burr*, 18 N. Y. 96, 1858; *Smith* v. *Townsend*, 32 Pa. 434, 1859; and if a gift to a charity is limited to an individual upon a contingency not within the time of the rule, it will be void: *Brattle Sq. Ch.* v. *Grant*, 3 Gray, (Mass.) 142, 1855; *Wells* v. *Heath*, 10 Gray, (Mass.) 17, 1857; but a contingent limitation over of property from one charitable use to another is not within the rule: *Trustees* v. *Grainger*, 1 Macn. & G. 460, 1849; *Jones* v. *Habersham*, 107 U. S. 174, 1882, affirming 3 Woods, (U. S.) 443, 1879; *Trustees* v. *Whitney*, 54 Conn. 342, 1887; *Lennig's Estate*, 154 Pa. 209, 1893. Where a gift was made to a charity, on condition that it keep the testator's tomb in repair, with remainder over to another charity on breach of that condition, the remainder was held valid: *Tyler* v. *Tyler*, [1891] 3 Ch. 252, 1891.

Constitutional Law, Bill of Rights, Criminal Law

The Court of Criminal Appeals of Texas has lately held, in *Cline* v. *State*, 36 S. W. Rep. 1099, that the provision of section 10 of the bill of rights, (substantially identical with the provisions of other state constitutions,) that in all criminal prosecutions the accused shall be confronted with the witnesses against him, refers to the prosecution by "public trial" before the "impartial jury" also guaranteed him by the same section; and in view of that provision, and the declaration of section 29, that "everything in this bill of rights shall forever remain inviolate and all laws contrary thereto . . . . shall be void," neither court nor legislature can legally authorize the reading in evidence against the accused on his trial of testimony given by witnesses on another hearing, whether at the trial in court or before an examining magistrate, even upon a showing that such witnesses are dead.

The Supreme Court of Missouri, Division No. 2, has

recently decided, that the act of that state, (Rev. Stat. Mo. 1889, § 3782,) which provides that "every person who shall knowingly send or deliver any letter, writing, printing, circular, or card, with or without a name subscribed thereto or signed with a fictitious name, or any letter, mark or device, threatening . . . . to do any injury to the person, property, credit, or reputation of another, though no money or property be demanded or extorted thereby, shall, on conviction, be adjudged guilty of a misdemeanor," is not unconstitutional, either as depriving the creditor of property without due process of law, or as limiting the freedom of speech; and that under that act a person who sends letters to a debtor, threatening to publish him among his neighbors as a bad debtor, unless the debt is paid, is liable to the penalty thereof: *State* v. *McCabe*, 37 S. W. Rep. 123.

Freedom of Speech, Threatening Letters, Collection Agency

In *Ernest* v. *Loma Gold Mines, Ltd.*, [1896] 2 Ch. 572, Chitty, J., of the Chancery Division, has made an important ruling on the subject of voting by proxy. The articles of association of the defendant corporation provided that at any general meeting "every motion made and submitted shall be decided in the first instance by a majority in number of the members to be ascertained by a show of hands; and unless a poll is demanded by at least three members holding at least one-tenth of the shares of the company, a declaration by the chairman that a resolution has been carried . . . . shall be sufficient evidence of the fact . . . ." (60;) that "every member shall have one vote for every share which he shall hold in the company" (62;) and that votes may be given either personally or by proxy" (66.) At an extraordinary general meeting to consider a resolution to go into liquidation, the plaintiff, who was himself the owner of 2000 shares, held valid proxies from 431 shareholders, representing 102,000 shares. When the resolution was put to the meeting, twelve shareholders voted for it on the show of hands, and the plaintiff and another against it. The plaintiff claimed to vote for him-

Corporations, Meetings, Voting by Proxy, Viva Voce Vote

self and all others whose proxies he held, but the chairman refused to consider this claim, and declared the resolution carried. The plaintiff then demanded a poll, but this was refused, on the ground that it was not demanded by a sufficient number of members present in person. The resolution was subsequently confirmed, and the plaintiff then brought suit for an injunction to restrain the company from acting upon it; but this was refused on the ground that the provision of the articles of the association that votes should be given either personally or by proxy did not apply to voting by show of hands; and that a member present only by proxy has no right to vote upon a show of hands: (following *In re Caloric Engine & Siren Fog Signals Co.*, 52 L. T. N. S. 846, 1885, and disapproving *In re Bidwell Brothers*, [1893] 1 Ch. 603, 1893.).

This statement seems too broad, though correct as applied to the state of facts which called it forth. If the person who claims to vote is not himself a member, (which is by no means an impossible case,) he certainly should be allowed to vote, even on a show of hands; and if he holds two or more proxies, he should still be allowed one vote.

In the same case the notice convening an extraordinary general meeting to confirm the above special resolution, was accompanied by a circular from the secretary and directors, with a proxy attached, asking for the return of the proxy in support of the resolution. By an error of the printer the date of the meeting was left blank in the proxy. In several of the proxies this blank was filled by the secretary after they had been executed and returned by the members. The plaintiff objected to them on this ground, and, his objections being overruled, alleged this as a ground for the injunction; but the court held that since the members must have intended by returning the proxies in compliance with the circular that they should be used at this particular meeting, authority to the secretary to fill in the date would be presumed, and that the proxies were valid.

Validity of Proxy

In order to render a newly-organized corporation liable at common law for the debts of an established corporation or

Newly-Organized Corporation, Liability for Debts of Predecessor

firm to whose business and property it has succeeded, it should be proved: (1) That it has expressly assumed them by contract with its predecessor; or (2) That the transfer of the property and franchises of the predecessor amount to a fraud upon the creditors of the latter; or (3) That the circumstances attending the creation of the new corporation, and its succession to the business, franchises and property of the old, are such as to warrant the finding that it is a mere continuation of the former,—*i. e.*, the same corporate body under a new name: *Austin* v. *Tecumseh Natl. Bk.*, (Supreme Court of Nebraska,) 68 N. W. Rep. 628.

Liability of Old Corporation for Debts of New

In *Hatcher* v. *United States Leasing Co.*, (Circuit Court, District of Colorado,) 75 Fed. Rep. 368, a mining company, having exhausted its resources and incurred a large indebtedness in attempting to develop its mines, leased the same to a new corporation formed by the same stockholders under the laws of a different state. The new corporation paid off the debts of the old one, and prosecuted the work for some time, but finally became insolvent. Under the circumstances, it was held that as far as third persons were concerned, the reorganization was a mere change of name, without affecting the ownership of the property, and that the old company, as well as the new, was chargeable with a mechanic's lien for labor and materials furnished to the latter.

Cruelty to Animals, Shooting Doves or Pigeons from Trap

The Supreme Court of Colorado has lately held, that under the act of that state, (Mills's Am. Stat. Colo. § 104,) which provides that "every person who . . . . tortures, torments . . . . or needlessly mutilates or kills . . . . any animal, or causes or procures it to be done, ... shall, upon conviction be punished," etc., a member of a gun club, shooting for amusement doves or pigeons from a trap, some of which are wounded and afterwards killed, while some escape apparently unhurt, is liable, though those killed are used for food: *Waters* v. *People*, 46 Pac. Rep. 112.

This is in accord with the case of *State* v. *Porter*, 112 N. C. 887, 1893, decided under a similar statute, and opposed to that of *State* v. *Bogardus*, 4 Mo. App. 215, 1877, which, under a like statute, reached the opposite conclusion. It would seem, however, that not only the weight of authority, but of reason as well, supports the view of the majority: *Comm.* v. *Lewis*, 140 Pa. 261, 1891, must be distinguished from these, for the Pennsylvania statute only punishes those who "wantonly or cruelly ill-treat . . . . any animal."

Divorce, Pendency of Actions in Different States, Ex parte Decree, Validity, Bona Fides

According to a recent ruling of the Supreme Court of Illinois, though the pendency of an action for divorce in one state will not constitute a legal bar to an action subsequently commenced in another state between the same parties, yet it is a fact of which the second court should be fully advised, as it is a ground upon which it may, in the exercise of its discretion, and in the spirit of comity, stay its proceedings, when it can do so without prejudice to the rights of its citizens; and when the second action is *ex parte*, and the plaintiff conceals the fact of the pendency of another action in a different state, in which issue has been joined on facts essential to the jurisdiction of the second court, that concealment amounts to a fraud on the court, which will render its decree in the suit null and void: *Dunham* v. *Dunham*, 44 N. E. Rep. 841, affirming 57 Ill. App. 475.

In the case under discussion a husband brought an action for divorce in the state of his residence, which was also the domicile of the marriage, charging the infidelity of the wife, and that she had deserted the plaintiff without cause, and gone with her paramour to another state, for the sole purpose of acquiring a residence there, and fraudulently procuring a divorce. Personal service was obtained on the wife, who appeared, and joined issue upon those allegations by answer. Subsequently she began an action for divorce in South Dakota, which was heard *ex parte*, constructive service being had on the husband, and the court not being advised of the pendency of the former suit, and a decree of divorce was

obtained therein prior to the determination of the husband's action. It was then attempted to plead this decree in bar of the husband's suit; but the court held that under the facts it was no valid bar.

The fall brings its usual crop of election decisions. One of the most interesting of these is, that when an election is required to be held contemporaneously in several districts, (*e. g.*, for the purpose of determining whether they will join for the purpose of holding a union high school,) it will not be invalidated by the fact that no election is held in one of these districts, if it appears that had an election been held there, and had all the qualified voters of that district cast their votes against the proposition a large majority would still be in favor of it: *Sharp* v. *George*, (Supreme Court of Arizona,) 46 Pac. Rep. 212.

Elections, In Several Districts, Failure to Hold in one District

The Supreme Court of Montana has recently held, that a party convention of a single county, which is one of two or more counties comprising a judicial district, has no authority to place in nomination a candidate for a state office in that district, since a legal nomination to such an office can only be made by a convention representing all the voters in the several counties of the district: *State* v. *Rotwitt*, 46 Pac. Rep. 370.

Elections, Nomination of Candidates, District Composed of Several Counties

The same point was similarly decided in *In re Ingram's Certificate*, 14 Pa. C. C. 1, s. c., 3 D. R. 272, 1893, and *In re Craig's Certificate*, 14 Pa. C. C. 3, 1893; and as to nominations by conferrees, in *In re Butler Twp. Nomination Papers*, 14 Pa. C. C. 470, 1894; *In re Savage's Nomination*, 15 Pa. C. C. 229; S. C., 3 D. R. 705, 1894.

In the same case the court ruled that since the statute has recognized the right of political parties to nominate candidates for office through conventions or primary meetings, they have an equal right to refrain from making nominations, and no person not so nominated has the right to have his name placed on

Nomination by Petition, Rights of Political Parties

the official ballot as the candidate of a party; and therefore a candidate placed in nomination by petition is the nominee of the petitioners only, and cannot be designated on the official ballot as the candidate of a regularly nominated party: *State* v. *Rotwitt*, (Supreme Court of Montana,) 46 Pac. Rep. 370.

The Supreme Court of Colorado has properly interpreted the requirement of the state constitution (Art. 7, § 1,) that a voter must reside in the state for six months immediately preceding an election, to be entitled to vote, to mean an actual settlement within the state, adopted as a fixed habitation, and accordingly held that persons coming from another state to work under contract of employment, leaving their families behind them, were not residents of Colorado in the sense that qualified them to vote: *Sharp* v. *McIntire*, 46 Pac. Rep. 115.

Voters, Residence

Not so many years ago, this precise question was raised at an election in Montgomery county, Pennsylvania; and the persons who were interested in having the illegal voter vote secured from the county judge an *ex parte* expression of opinion on the strength of which the election officers, against their better judgment, received his vote.

According to the Court of Appeals of Kentucky, when, in a *viva voce* election for trustee of a school district, a voter casts his vote for one person, and it is so recorded, whereupon he leaves the table where his vote is taken, and other votes are then cast and recorded, he cannot thereafter have his vote changed to the other candidate, even though he had intended to vote for him, and called the name he did by mistake or inadvertence: *Hopkins* v. *Swift*, 37 S. W. Rep. 155.

Viva Voce Voting

Some of the readers of this magazine may remember that this was the predicament into which Mr. Murtough Murphy shrewdly entrapped the unhappy Mr. Furlong, who had come down from Dublin to teach the rustics how to conduct an election, as is recorded by one Samuel Lover, in a book entitled "Handy Andy."

The Court of Appeals of New York has recently held that the act of that state of 1895, c. 810, § 83, which amends the

Special Election, Ballot Laws, Mode of Voting

general election law, and provides for the preparation and use of official ballots at all elections for the submission of questions to the electors of the state, "or of any district thereof," does not apply to an election held under an act authorizing the holding of an election in territory to be designated, to determine whether or not such territory shall become incorporated into a village; and that the provisions of the latter act, prescribing the mode of voting at such elections, are still in force: *In re Taylor*, 44 N. E. Rep. 790, affirming 38 N. Y. Suppl. 348.

In the same case it was also held, that the act (Laws N. Y. 1895, c. 73,) authorizing the use of voting machines, and

Voting Machines

providing that, when adopted by a town, they shall be used at all elections in that town, or any part thereof, applies only to elections in organized divisions of the town, and not to an election at which the voters in certain territory within a town vote on the question whether such territory and a portion of the territory of another town shall be incorporated into a village.

According to the Supreme Court of Colorado the Ballot law of that state (Acts Colo. 1891, p. 143,) which provides

Ballots, Marking

that "where a cross is marked in ink against a device indicating a vote for the entire set of candidates, and also another cross in ink against one or more names in another list, such ballot shall only be held invalid as to any office so doubly marked," implies that such ballot shall not be counted for either candidate for an office so doubly marked: *Heiskell* v. *Landrum*, 46 Pac. Rep. 120.

When a voter writes in the name of a candidate on the ballot, the fact that he also writes after the name the party

Distinguishing Mark

designation of that candidate does not invalidate the ballot on the ground that it constitutes a distinguishing mark: *Jennings* v. *Brown*, (Supreme Court of California,) 46 Pac. Rep. 77.

Under a statute (Burns's Rev. Stat. Ind. 1894, § 6325,)

Elections, Criminal Offences

which provides that "whoever hires or buys . . . . any person to vote or refrain from voting any ticket or for any candidate for any office at any

election held pursuant to law, or at any primary election or convention of any political party, then the person so offending in any one of the foregoing particulars, and all other persons aiding, abetting, counseling, encouraging or advising such acts, shall become liable," etc., the offence denounced by the statute is complete when a voter is hired to go away from the polls and refrain from voting at the time he goes there for that purpose, though he subsequently returns and casts his vote: *Thompson* v. *State*, (Appellate Court of Indiana,) 44 N. E. Rep. 763.

Evidence, Photographs

The difference between the images produced upon a photographic plate and upon the human eye does not render photographs of the plan where an accident has been caused inadmissible in evidence, but bears only upon the effect of such evidence: *Scott* v. *City of New Orleans*, (Circuit Court of Appeals, Fifth Circuit,) 75 Fed. Rep. 373.

Another instance of misplaced ingenuity! The lawyer who raised this point should give his time to the writing of detective stories.

Extradition, Inter-state, Warrants Procured by False Affidavits

When a prisoner is committed for trial on a criminal charge, under state process which is in itself regular and valid, his imprisonment is not rendered illegal by the fact that he was brought back from another state as a fugitive from justice, by means of extradition warrants procured by false affidavits; and the federal courts will not release him on *habeas corpus* on that ground alone: *In re Moore*, (District Court, D. Oregon,) 75 Fed. Rep. 821.

This decision is the necessary result of the doctrines that a fugitive who has been kidnapped and brought back into the state where his offence was committed is not entitled to release on *habeas corpus*: *Ex parte Scott*, 9 B. & C. 446, 1829: *Ex parte Ker*, 18 Fed. Rep. 167, 1883; *Ker* v. *Illinois*, 119 U. S. 436, 1886, affirming *Ker* v. *People*, 110 Ill. 627, 1884; *Mahon* v. *Justice*, 127 U. S. 700, 1888, affirming 34 Fed. Rep. 525, 1888; *State* v. *Ross*, 21 Iowa, 467, 1866; *Dows' Case*, 18 Pa.

37, 1851; *State* v. *Smith*, 1 Bailey, (S. Car.) 283, 1829; *State* v. *Brewster*, 7 Vt. 118, 1835; *contra*, *State* v. *Simmons*, 39 Kans. 262, 1888; *In re Robinson*, 29 Neb. 135, 1890; and that when once he is within the jurisdiction he can be tried for any offence other than the one for which he was surrendered by a sister state: *In re Noyes*, (U. S.) 17 Alb. L. J. 407, 1878; *Lascelles* v. *Georgia*, 148 U. S. 537, 1893, affirming 90 Ga. 347, 1892; *Carr* v. *State*, 104 Ala. 4, 1893; *Williams* v. *Weber*, 1 Colo. App. 191, 1891; *People* v. *Sennett*, (Ill.) 20 Alb. L. J. 230, 1879; *Hackney* v. *Welsh*, 107 Ind. 253, 1886; *Waterman* v. *State*, 116 Ind. 51, 1888; *State* v. *Kealy*, 89 Iowa, 94, 1893; *Comm.* v. *Wright*, 158 Mass. 149, 1893; *State* v. *Patterson*, 116 Mo. 505, 1893; *State* v. *Walker*, 119 Mo. 467, 1894; *In re Petry*, (Neb.) 66 N. W. Rep. 308, 1896; *People* v. *Cross*, 135 N. Y. 536, 1892, affirming 64 Hun, 348, 1892; *State* v. *Glover*, 112 N. C. 896, 1893; *In re Brophy*, 2 Ohio N. P. 230, 1895; *Comm.* v. *Johnston*, 12 Pa. C. C. 263, 1892; *Ham* v. *State*, 4 Tex. App. 645, 1878; *Harland* v. *Territory*, 3 Wash. Ty. 131, 1887; *State* v. *Stewart*, 60 Wis. 587 1884; *contra*, *In re Hope*, 40 Alb. L. J. 441, 1889; *In re Baruch*, 41 Fed. Rep. 472, 1890; *In re Fitton*, 45 Fed. Rep. 471, 1891; *State* v. *Hall*, 40 Kans. 338, 1888; *In re Cannon*, 47 Mich. 481, 1882; though not when surrendered by a foreign country, even for a less offence included in the greater: *U. S.* v. *Watts*, 14 Fed. Rep. 130, 1882; *Ex parte Hibbs*, 26 Fed. Rep. 421, 1886; *U. S.* v. *Rauscher*, 119 U. S. 407, 1886; *Ex parte Coy*, 32 Fed. Rep. 911, 1887; *Comm.* v. *Hawes*, 13 Bush, (Ky.) 697, 1878; *State* v. *Vanderpool*, 39 Ohio St. 273, 1883; *Blandford* v. *State*, 10 Tex. App. 627, 1881; *contra*, *U. S.* v. *Caldwell*, 8 Blatchf. (U. S.) 131, 1871; *U. S.* v. *Lawrence*, 13 Blatchf. (U. S.) 295, 1876; *In re Miller*, (U. S.) 6 Crim. L. Mag. 511, 1885; *In re Reinitz*, 39 Fed. Rep. 204, 1889; *People* v. *Harman*, 9 Misc. Rep. (N. Y.) 600, 1894; *People* v. *Stout*, 81 Hun, (N. Y.) 336, 1894. (See 28 Am. L. Rev. 568; 32 Am. L. Reg. N. S. 557.)

The courts of Nebraska and Ohio have yielded on the former points to the decision of the Supreme Court of the United States, and surrendered their former opinions: *In re*

Petry, (Neb.) 66 N. W. Rep. 308, 1896, overruling *In re Robinson*, 29 Neb. 135, 1890; *In re Brophy*, 2 Ohio N. P. 230, 1895, overruling *Ex parte McKnight*, 48 Ohio St. 588, 1891; but the courts of Kansas apparently cling to their old views; See *State* v. *Meade*, 56 Kans. 690, 1896.

In accord with the doctrines above enumerated, it has been held that a prisoner cannot set up as a ground for discharge that he has been enticed into the state by fraudulent representations: *In re Brown*, 4 N. Y. Crim. Rep. 576, 1886; nor that the extradition proceedings in the other state were irregular: *Hall* v. *Patterson*, 45 Fed. Rep. 352, 1891; *In re Miles*, 52 Vt. 609, 1880.

Husband and Wife, Wife's Separate Estate, Power to Devise, Curtesy

The Supreme Court of Appeals of Virginia has recently held that the authority conferred by statute upon a married woman to devise her separate estate, (Code Va. § 2513,) is equivalent to an express power so to devise in the instrument creating the estate, in the absence of any provisions therein to the contrary; and therefore, that a conveyance of land by a father to his daughter's husband "in trust, nevertheless, for the sole, separate and exclusive use and benefit" of the daughter, "and free and discharged from debts, contracts, liabilities and marital control" of the husband, creates a sole and separate estate in her, which she can dispose of by will, free from the husband's right of curtesy: *Kiracofe* v. *Kiracofe*, 25 S. E. Rep. 601.

Injunction, Misdemeanor, Intoxicating Liquors, Sale by Club

A member of a social club may maintain suit to enjoin the commission by it of an indictable misdemeanor, such as the sale of intoxicating liquors, when the commission of the act, if it is such a misdemeanor, will probably damage property rights of his in the club: *Klein* v. *Livingston Club*, (Supreme Court of Pennsylvania,) 35 Atl. Rep. 606.

In the same case it was held that the furnishing of liquor by a club to its members, each paying the cost of what he consumes, is not a sale within the meaning of an act (Act Pa.

May 13, 1887, P. L. 108,) making the sale of liquor without license illegal. This is in accord with the weight of authority.

Accident Insurance, Notice of Death, Sufficiency

In a recent case before the Supreme Court of Indiana, the terms of the accident insurance policy on which suit was brought, required, under penalty of forfeiture, that notice of accidental injury or death be given within ten days, with "full particulars of the accident and injury." It appeared that the insured was drowned; that his wife, who was the beneficiary, did not and could not know until the finding of a coroner's jury, eleven days after his death, that he died of accident; that she gave the required notice within five days afterwards; that the company admitted that he was accidentally drowned; and that the general agent of the company had actual knowledge of the facts within the ten days. Under these facts, it was held that the notice was sufficient: *Peele* v. *Provident Fund Soc.*, 44 N. E. Rep. 661.

Fire Insurance, Subrogation, Benefits Renounced by Insured, Rights of Insurer

A new and very interesting question of insurance law lately arose in a case tried in the Commercial Court in London, before Collins, J., without a jury: *West of England Fire Ins. Co.* v. *Isaacs*, [1896] 2 Q. B. 377. The facts were substantially as follows: The premises insured were demised by one Bunnell and another to Jones and Hill for a term which expired in December, 1894, with covenants to repair and leave in repair, and also to insure the premises in the Royal Exchange Assurance Corporation in the joint names of the lessor and lessees. About one year after the demise Jones assigned his interest to Hill, who in 1880 assigned to one Bennett. The following year Bennett secured a policy for £800 on the buildings in the Royal Exchange corporation in the joint names of himself and the lessors, which policy was still in existence at the date of the action. In 1885, Bennett granted to the defendant a lease of a warehouse, part of the premises comprised in the original lease, for the residue of the term, less ten days; this lease containing covenants on the part of the defendant, the lessee, to repair and leave in repair, and on the part of Bennett, the

lessor, to insure the premises and to lay out the moneys received under any insurance policy in making good damage by fire, with a proviso that if such moneys proved insufficient the defendant was to remain liable under his covenant to repair to make good the deficiency. On August 26, 1885, the defendant obtained a policy in his own name with the plaintiff company in the sum of £800 on the warehouse demised to him by the sublease. In 1890 Bennett died, and in the following year an action was brought in the Chancery Division for the administration of his estate. On July 18, 1893, a fire occurred by which the warehouse leased to the defendant was damaged. In 1894 an order was made in the administration action by which Bennett's lease and the benefit of his policy in the Royal Exchange corporation were assigned to Jones, and a deed carrying out the order was duly executed. Notice to repair, accompanied by a specification or schedule of dilapidations, was given under the original lease by the lessors to Jones, who in turn gave notice to repair, with a schedule of dilapidations, to the defendant. Jones died shortly afterwards, and his executors demanded from the Royal Exchange corporation the payment of £100, the amount at which both insurers and the defendant had agreed to fix the damage. On March 28, 1894, the plaintiff company, having been sued by the defendant, paid him the sum of £100, the agreed amount of the loss caused by the fire. It was admitted, that at this time the plaintiffs knew of the existence of the Royal Exchange policy.

On January 9, 1895, the original lease and the sublease having both expired, the ground landlords brought an action against Jones's executors to recover damages for breach of the covenant to repair, contained in their lease; and on January 19th a like action was brought by Jones's executors against the defendant. The first action was settled by a payment of £250, and the action brought against the defendant herein was also settled by his paying to Jones's executors £140, they giving him a receipt for all claims under the schedule of dilapidations, which included damages by fire, and he undertaking at the same time not to bring any action against them for breach of

the covenant in the sublease to lay out insurance moneys received in repairing the damage caused by the fire. Jones's executors continued to press their claim against the Royal Exchange corporation, and, on April 19, 1895, the sum of £100 was paid to them by that corporation, in discharge of their claim. The plaintiff then brought this action against the defendant, to recover the sum of £100, upon the ground that in making the settlement with Jones's executors the defendant had had the benefit of the Royal Exchange policy or of the lessor's covenant in the sublease, or alternatively that he was bound to make good to the plaintiffs the full value of his rights against his lessor which he had renounced for his own reasons, and to which, if not renounced, the plaintiff would have had a right to be subrogated. This latter contention was sustained by the court, on the ground that, since a policy of fire insurance is a contract of indemnity, the insurer is entitled to recover from the insured not merely the value of any benefit received by him by way of compensation from other sources in excess of his actual loss, but also the full value of any rights or remedies of the assured against third parties which have been renounced by him, and to which, but for that renunciation, the insurer would have a right to be subrogated.

Judgment, Revival, Scire Facias, Effect, Full Faith and Credit

After previously declaring that it is the duty of the courts to give full force and effect to the full faith and credit clause of the Constitution of the United States, the Supreme Court of Vermont proceeds to escape from the consequences of that declaration, by holding that when a judgment entered in a foreign state under a power to confess judgment on a note is revived there by *scire facias* without service on or appearance by the defendant, the plaintiff cannot recover thereon after the limitation has run against the original judgment; for such a revival is either a new proceeding, substituted for an action of debt, and therefore invalid if prosecuted without service on the defendant or appearance by him, or a continuation of the

original action, and therefore barred by the statute of limitations: *Betts* v. *Johnson*, 35 Atl. Rep. 489.

Unhappily, this doctrine has the support of the Supreme Court of the United States, *Owens* v. *McCloskey*, 161 U. S. 642; S. C., 16 Sup. Ct. Rep. 793, 1896, (see 35 AM. L. REG. N. S. 325,) and must therefore be regarded as settled. But it seems to savor of technicality, rather than of justice.

Landlord and Tenant, Eviction

The Supreme Court of Wisconsin has lately ruled, that when a landlord, who owned another building adjoining that occupied by a tenant, the two being constructed together, tore the former down, rendering the latter unsafe for occupancy, and then procured its condemnation and destruction by the city authorities, these acts constituted an eviction, for which the tenant might recover damages; and that the landlord could not avail himself of the action of the city authorities as a defence: *Silber* v. *Larkin*, 68 N. W. Rep. 406.

Libel, Privileged Publication

According to a recent decision of the last-mentioned court the publication in a newspaper of remarks made at a meeting of a city council, by the city's representative in the state assembly, purporting to give information as to the conduct of the city's representative in the state senate with reference to the passage of certain amendments to the city charter, is not privileged, though the newspaper is the official paper of the city, if the article is a mere voluntary unofficial report, published simply as a matter of news; especially when the paper circulated outside the city and the district represented by the senator: *Buckstaff* v. *Hicks*, 68 N. W. Rep. 403.

Licenses, Constitutional Law

The Supreme Court of Vermont upholds as constitutional an act of that state, (Acts Vt. 1894, No. 59,) which provides that every person desiring to do business in the state as an itinerant vendor shall deposit $500 with the state treasurer, to be returned at the end of the year less fines and penalties, after which, on application, and the payment of a fee of $25, he is entitled to

a state license for one year; that he may then apply to the city or town clerk where the goods are kept for sale, and shall file a sworn statement of the average value of his stock, and if, in the judgment of the board of aldermen or selectmen, a local license should be granted him, *the clerk may be authorized* to issue it on payment of a sum based on that value: *State* v. *Harrington*, 35 Atl. Rep. 515.

The court bases its decision, so far as the vulnerable point of the act is concerned, on the fact that the act reposes a judicial discretion in the aldermen or selectmen, thus securing the applicant against their arbitrary action. But since the act provides no safeguard against the arbitrary or malicious exercise of that discretion, and the court confesses its inability to aid him in case they abuse it, it may well be doubted whether this protection does protect. It would seem to any ordinary mind that the Connecticut statute, which was declared unconstitutional in *State* v. *Conlon*, 65 Conn. 478, 1895, and which provided that the city and town authorities "*may* issue" a license, was not so very unlike one which provides, as the present one, that the clerk "may be authorized" to issue it, even though it is predicated that it should be proper *in their judgment* to grant that authority; and it would also seem that the airy way in which, after stating that the Vermont statute is "nearly an exact transcript of the Massachusetts Act of 1890," which was held constitutional in *Comm.* v. *Crowell*, 156 Mass. 215, 1892, the court passes by without discussion the fact that that statute declares that the clerk "shall issue" the license, shows a dread of the possible result of such a discussion. To say the least, the argument by which the decision is supported is unconvincing.

Mails, Improper Use, Defamatory Matter

In *U. S.* v. *Bunnell*, (District Court, S. D. Iowa, C. D.,) 75 Fed. Rep. 824, it appeared that a paper issued by a collection agency contained on its first page a motto showing that its purpose was to collect debts; that a large part of the paper contained notices warning the public against persons alleged to have failed to pay their debts, or asking for information as to such per-

sons; that, when an account was sent to the agency for collection, the alleged debtor was notified that, if not paid, the account would be advertised in the paper as being for sale; and that the paper contained many such advertisements. Upon these facts it was held, that, since the object appeared to be to coerce the payment of money, the notices published were "calculated by the terms . . . . and obviously intended to reflect injuriously upon the character or conduct of another," within the meaning of the act of Congress of September 26, 1888, (1 Suppl. Rev. Stat. U. S. 621.)

Negligence, Proximate Cause

According to a recent decision of the Supreme Court of Indiana, the negligence of a railway company in blocking a street crossing with its train for an unreasonable length of time is not the proximate cause of injuries received by a pedestrian from a fall caused by a defect in the street while he was endeavoring to pass around the train: *Enochs* v. *Pittsburgh, C., C. & St. L. Ry. Co.*, 44 N. E. Rep. 658.

Nuisance, Sewage, Chemical Combination

Sewage discharged into a stream, though sterilized and rendered colorless and apparently innoxious of itself, may become a nuisance, when, by reason of its combination with other substances in the stream, it becomes noxious and pollutes the waters, though the other substances were wrongfully deposited in the stream by others than the defendant; and in such case its further discharge into the stream may be enjoined: *Morgan* v. *City of Danbury*, (Supreme Court of Errors of Connecticut,) 35 Atl. Rep. 499.

Public Contracts, Lowest Bidder

Under a statute which expressly provides that in awarding a contract for public employment the awarding body shall not be "limited to the lowest bidder, but may take into consideration the responsibility of such bidder, and his capacity and ability to perform such contract, in all cases making such awards as will promote the best interests of the state, and secure the cheapest

and most prompt and efficient performance of said contract," that body is invested with a very broad discretion, and though they must advertise for bids, they may reject any or all of them, and award the contract to one who has not bid at all, if the price be reasonable: *Peeples* v. *Byrd*, (Supreme Court of Georgia,) 25 S. E. Rep. 677.

Public Officers, Interest in Contracts

The secretary of a corporation which has a contract for lighting a city, who is also a stockholder therein, is within the prohibition of an act, (Act Pa. March 31, 1860, P. L. 382, § 66,) prohibiting any councilman from being interested in any contract with the city, though he was elected councilman after the execution of the contract: *Comm.* v. *DeCamp*, (Supreme Court of Pennsylvania,) 35 Atl. Rep. 601.

Salary, Attachment, Execution

The Supreme Court of Minnesota, following the analogy of the rule laid down in *Roeller* v. *Ames*, 33 Minn. 132, 1885, that the salary of a municipal officer due him from the corporation cannot be reached by proceedings supplementary to execution, holds that the wages of a fireman due him for services as such cannot be thus reached by his creditors, on the ground that public policy forbids that legal proceedings should intervene to prevent the payment to the fireman himself of the wages due him for his services: *Sandwich Mfg. Co.* v. *Krake*, 68 N. W. Rep. 606.

Seal of Office

The Supreme Court of Wisconsin has recently decided, that a requirement that a public officer shall have a seal of office, by which his acts shall be authenticated, is not complied with by the use of a seal which does not contain the name of the state, but in which the space for that name is left blank, and in the impression the name is written in that space with a pen; and that a verification authenticated by such a seal is insufficient: *Oelbermann* v. *Ide*, 68 N. W. Rep. 393.

The rule that holds the public records open to the inspection of any one, which was discussed in the preceding number

Public Records, Proceedings of Electoral Board Inspection

of this magazine, (35 AM. L. REG. N. S. 721, *et seq.*,) does not extend to such records as are by law required to be kept secret; and therefore, though so much of the record of the proceedings of the electoral board of a county, (in Virginia,) required by law to be kept, as relates to matters other than the preparation of official ballots, is open to the inspection of any citizen and voter, who may make notes or memoranda therefrom at any reasonable time, and within a reasonable space of time, in the presence of the secretary of the board, yet so much of said record as relates to the preparation, printing, or certification of official ballots to be used at elections, which proceedings are required by law (Laws Va. 1895-6, pp. 763-770,) to be kept secret, is not open to the inspection of any one, except officers charged with duties in connection therewith. Accordingly, a writ of mandamus will not be granted to compel the secretary to permit the relators to inspect and copy from the record of the proceedings of the electoral board of a county, when it is not shown that the portions desired to be inspected and copied are such as are properly open to the public, and that their reasonable request therefor has been refused: *Gleaves* v. *Terry*, (Supreme Court of Appeals of Virginia,) 25 S. E. Rep. 552.

Soldiers' Home, Rules, Pensions

In *Ball* v. *Evans*, (Supreme Court of Iowa,) 68 N. W. Rep. 435, the plaintiffs, members of the Iowa Soldiers' Home, at Marshalltown, Iowa, brought suit for the purpose of setting aside certain rules adopted by the board of managers in reference to the disposition of pensions paid to the inmates. These rules were as follows:

"Second. Any person admitted to the home having a pension exceeding six dollars per month shall surrender all of said pension in excess of six per month to the commandant; and, if the person so surrendering his pension has dependent relatives, the money so surrendered shall be paid to such dependent relatives by the commandant; and, in case such pensioner shall have no dependent relatives, the excess of his

pension over six dollars per month shall be credited by the commandant to the support fund. Third. If any member of the home shall fail or refuse to surrender to the commandant the portion of his pension as herein required, such refusal or failure shall be deemed a violation of the rule, and the commandant shall give such offending member an honorable discharge."

"Rule 25. Any person entering the home having a pension exceeding six dollars per month shall surrender all of said pension in excess of six dollars per month to the commandant; and, if the person so surrendering his pension has dependent relatives, the money so surrendered shall be paid to said relatives by the commandant; and, in case such person shall have no dependent relatives, the excess of his pension over six dollars per month shall be credited to the contingent fund. The words 'dependent relatives,' as herein used, shall mean wife, minor children, and parents."

"Rule 27. All members of the home who shall hereafter be charged and found guilty of violating the rules of the home, and who have a pension, shall surrender the entire amount of their pension to the commandant, who may, in his discretion, pay the same to the pensioner, or to his dependent relatives, (under Rule 25,) or turn the same over to the state, as in his judgment may seem to the best interest of the home."

The court, however, following *Loser* v. *Board*, 92 Mich. 633, 1892, held these rules to be valid, as being within the act of assembly providing for the establishment of the home, which conferred upon the managers the power to "determine the eligibility of applicants for admission to said home," (§ 2,) and to "adopt a seal and make rules and regulations, not inconsistent with the laws and constitution of this state, for the management and government of said home, including such rules as they may deem necessary for the preserving of order, enforcing discipline, and preserving the health of its inmates;" and not being in violation of Rev. Stat. U. S. §§ 4745, 4747, which enact that any pledge, mortgage, sale, transfer, or assignment of any right, claim, or interest to a pension shall be void.

Specific Performance, Sufficiency of Title

Specific performance of a contract for the purchase of real estate will not be enforced against a vendee, when the title offered by the vendor can be held good only by declaring a statute unconstitutional, and when, even if this were done, and the vendee compelled to accept the title, he would still be exposed to suit by interested persons who are not parties, and who therefore would not be bound by the judgment: *Daniel* v. *Shaw*, (Supreme Judicial Court of Massachusetts,) 44 N. E. Rep. 991.

State Legislature, Joint Resolution, Duty of Secretary of State

The expression of the sovereign will of the legislature that a particular proposition or question be submitted to the people to be voted upon need not take the form of a law; it is sufficient if it be in the form of a joint resolution. Therefore, it is the duty of the secretary of state to certify to the proper officers of the various counties in the state a joint resolution passed by the legislature, that the question whether a constitutional convention should be held should be submitted to the people; and he may be compelled by mandamanus to do so, if he refuses: *State* v. *Dahl*, (Supreme Court of North Dakota,) 68 N. W. Rep. 418.

Statutes, Amendment, Constitutional Law

The amendment of a subdivision of a section of a specified statute is not unconstitutional, though the amendatory act does not contain the whole section as amended. It is a sufficient compliance with the requirements of the constitution if the new act contains the subdivision as amended: *State* v. *City of Kearney*, (Supreme Court of Nebraska,) 68 N. W. Rep. 533.

Street Railroad, Injury to Person Alighting from Car

The Supreme Court of Oregon holds, disregarding the weight of authority, that a person who alights from a street-car in broad daylight, and in attempting to cross the track immediately behind the car, is struck by a car on the other track and injured, is guilty of such contributory negligence as will bar a recovery for the injury, because, when a pas-

senger on a street car steps from the car to the street, the relation of passenger and carrier ceases: *Smith* v. *City & Suburban Ry. Co.*, 46 Pac. Rep. 136.

Of the cases cited by the court, but two are in point: *Meyer* v. *Lindell Ry. Co.*, 6 Mo. App. 27, 1878, and *Buzby* v. *Traction Co.*, 126 Pa. 559, 1889, and it wholly ignores the numerous cases in which the contrary has been held. These will be found in the August number of this magazine: 35 AM. L. REG. N. S. 532. The need of supporting its decision by the ruling that the company owes no duty to the passenger after he has alighted is therefore apparent. But in any rational view of the case, the company does owe the passenger a duty while he is on its premises, to wit, the track, which is not discharged until he has reached the opposite side in safety. On all grounds, then, the decision is as manifestly wrong as was that of the Pennsylvania court in *Buzby* v. *Traction Co.*

Taxation, Inheritance, Stocks and Bonds of Foreign Corporations Owned by Non-residents

Under the tax laws of New York, which impose a tax on the transfer of property "when the transfer is by will . . . . of property within the state and the decedent was a non-resident," (Laws N. Y. 1892, c. 399, § 1,) and define the word "property," as used in the preceding clause, as embracing all property "over which the state has any jurisdiction for the purposes of taxation," (Laws N. Y. 1892, c. 399, § 22,) and also define "personal property" as including "all written instruments themselves as distinguished from the rights or interests to which they relate by which . . . . any debt or financial obligation is created, acknowledged, evidenced . . . . wholly or in part," (Laws N. Y. 1892, c. 677, § 4,) the Court of Appeals has lately ruled that bonds of a local corporation, kept at the residence of a non-resident owner, are not subject to the tax: *In re Bronson*, 44 N. E. Rep. 707, affirming 37 N. Y. Suppl. 476; and that federal bonds are not so subject: *In re Whiting's Estate*, 44 N. E. Rep. 715, affirming 38 N. Y. Suppl. 131; but that stocks of a local corporation kept at the residence of a non-resident owner are

liable to the tax, on the ground that a share of stock represents an interest in the corporate property, which does not follow the person of the creditor, but remains attached to the *situs*: *In re Bronson*, 44 N. E. Rep. 707, reversing 37 N. Y. Suppl. 476; and that bonds of a foreign corporation, kept with a safe deposit company in New York at the time of the death of a non-resident owner, are also liable thereto: *In re Whiting's Estate*, 44 N. E. Rep. 715, affirming 38 N. Y. Suppl. 131.

From this latter decision Gray and Haight, JJ., dissented, in an opinion (by Gray, J.,) which is conclusive. He shows beyond a doubt that the bonds of a foreign corporation cannot be regarded as having a *situs* in the state. It is a curious fact that the majority of the court seem to have wholly ignored the fact that if their ruling in the Bronson case that the bond follows the person of the creditor is correct, this decision must be wrong, for the locality of the bond does not effect that *situs*. The decision, therefore, seems erroneous; and since it is of such far-reaching consequence, one cannot but hope that an opportunity will arise for the Supreme Court of the United States to pass upon the question and settle it finally.

Trespass, Relief in Equity

An injunction will lie to prevent trespassing on a game preserve, by which game is killed, and other game is frightened away and deterred from returning, since the remedy at law is inadequate: *Kellogg* v. *King*, (Supreme Court of California,) 46 Pac. Rep. 166.

Trusts and Monopolies, Rights of Members, Jurisdiction of Equity

Where all combinations and associations of persons formed for the purpose of imposing an unreasonable restraint upon the exercise of a trade or business are unlawful and void, as against public policy and the statutes of the state, a court of equity will not lend its aid to a member of such an unlawful association, to enable him to retain his membership therein, and to restrain the association from suspending or expelling him for a violation of its illegal rules and by-laws: *Greer* v.

Payne, (Court of Appeals of Kansas, No 46 Pac. Rep. 190.

When a debt, including both principal and interest, and due by instalments, would be free from usury, if paid according to the terms of the contract, the transaction is not rendered usurious by the voluntary payment of the debt in full before some of the instalments matured, although the result is that the creditor receives in the aggregate a sum amounting to more than the principal and the maximum legal rate of interest: *Savannah Sav. Bk.* v. *Logan*, (Supreme Court of Georgia,) 25 S. E. Rep. 692.

Usury

The Supreme Court of Florida has lately reasserted the well-settled principles (1) That the owner of land through which subsurface water, without any distinct, definite and known channel, percolates or filters through the soil to the land of an adjoining owner, is not prohibited from digging into his own soil, and appropriating water found there to any legitimate purposes of his own, though, by so doing, the water may be entirely diverted from the land to which it would otherwise have naturally passed; but, if subterranean water has assumed the proportions of a stream flowing in a well-defined channel, the owner of the land though which it flows will not be authorized to divert it, pollute it, or improperly use it, any more than if the stream ran upon the surface in a well-defined course; and (2) That the only difference in the application of the law to surface and subsurface streams is in ascertaining the character of the stream; and that if it does not appear that the percolating waters are supplied by a definite flowing stream, they will be presumed to be formed by the ordinary percolation of water in the soil, this presumption being necessary on account of the difficulty in determining whether the water flows in a channel beneath the soil: *Tampa Waterworks Co.* v. *Cline*, 20 So. Rep. 780.

Waters, Percolating, Right Thereto

A bequest of money "for some one or more purposes, charitable, philanthropic, or———," is not void by reason of

Will, Construction, Legacy, Charitable Bequest

the blank, but must be treated as one "for charitable or philanthropic purposes." Such a bequest, however, is not a good charitable bequest, as there may be philanthropic purposes which are not charitable. *In re Macduff*, (Chancery Division, Court of Appeal,) [1896] 2 Ch. 451.

In *In re Pearsons' Estate*, (Supreme Court of California,) 45 Pac. Rep. 849, a testator directed specified property to be sold on a certain event, and that "the proceeds of such sale be equally distributed among the different orphan asylums of the city and county of San Francisco, and said asylums I request to be designated by the judge of the probate court." The property was sold, and thirteen institutions claimed a share of the fund realized. The court found that a part of this fund could be distributed without danger to creditors, and accordingly distributed it among five only of the thirteen applicants, rejecting the claims of the other eight. Four of these appealed. On the appeal, it was held

Bequest to Charity, Beneficiaries, "Orphan Asylums," Selection by Judge

(1) That the power of selection conferred on the probate judge by the will was not arbitrary, but was to be controlled by the powers conferred on the court by law; and that consequently all the institutions that could bring themselves within the terms of the will were entitled to share in the fund;

(2) That a society, no matter what its name, whose articles declared that "the objects and purposes of said society are to render protection and assistance to sick and dependent women and children," and which had a home in the city, where it carried on the work of caring for and educating orphans, half-orphans, and abandoned children, having therein an average of twenty orphans, one hundred and fifteen half-orphans, and forty-two abandoned children, and from one to three destitute women, was within the terms of the bequest;

(3) That an orphan asylum whose home was without the city, though it was managed by an organization from within the city, received most of its inhabitants therefrom, and did not confine its benefactions to the inhabitants of the city,

or make any discrimination in their favor, was not within the bequest;

(4) That a society whose charter empowered it to maintain an orphan asylum, but which, in fact, supported a reformatory, most of the inmates of its establishment being committed to it under Pen. Code Cal., § 1388, others being sent to it by the Society for the Prevention of Cruelty to Children, and one being now and then brought to it by a mother who could not support her child, or who had a child who was in the habit of running away, was not an "orphan asylum;" and,

(5) That institutions which did not maintain orphan asylums until after the testator's death were not entitled to share in the benefits of the bequest, though they had commenced to support such asylums before the fund arising from the bequest was distributed.

Ardemus Stewart.